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AHMAD ZAHID HAMIDI v. PP

HIGH COURT MALAYA, KUALA LUMPUR

COLLIN LAWRENCE SEQUERAH J

[CRIMINAL APPLICATION NO: WA-44-34-02-2022]

18 MAY 2022

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Abstract – *Public policy and public interest are paramount considerations in determining an application for an order that the prosecution supply defence statements, recorded from witnesses of the prosecution offered to the defence. Public policy, or public interest element or concerns, extend to the defence stage of the case. Certain documents applied may be subject to privilege. Although prosecution witnesses offered to the defence are, at that stage, technically defence witnesses, there is still the danger of these witnesses being subjected to intimidation.*

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CRIMINAL PROCEDURE: *Witness – Statements – Application by defence – Order that prosecution supply defence statements – Statements recorded from witnesses of prosecution offered to defence – Whether witness statements privileged – Whether confidential communication – Criminal Procedure Code, s. 51*

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EVIDENCE: *Witness – Statements – Application by defence – Order that prosecution supply defence statements – Statements recorded from witnesses of prosecution offered to defence – Whether witness statements privileged – Whether confidential communication – Evidence Act 1950, s. 124*

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In the present application, made pursuant to s. 51 of the Criminal Procedure Code ('CPC'), the applicant sought an order that the prosecution supply the defence statements, recorded from witnesses of the prosecution offered to the defence. The application was made before the commencement of the defence case, after the court had called for the defence of the applicant. Objecting to the application, the respondent argued that witness statements are privileged,

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is a confidential communication under s. 124 of the Evidence Act 1950 ('EA') and falls under the Official Secrets Act 1972. The investigating officer, in his affidavit, stated that: (i) the information disclosed by the witnesses were made in the course of an official communication and in official confidence to him as an officer of the Malaysian Anti-Corruption Commission (MACC); and (ii) any disclosure of information made by the witnesses in their statements would prejudice and compromise the public interest because the statements made by the witnesses were made in the belief and expectation that they would be confidential in nature and any disclosure would result in future witnesses being hesitant in coming forward to give statements and this would hamper efforts in future investigations.

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Held (dismissing application):

- (1) This application principally falls to be determined upon a consideration of s. 124 of the EA. The documents of the nature applied for by the applicant in this case were subject to privilege based on public interest and public policy considerations, flowing from the dictates of s. 124 of the EA. Although the provisions of s. 51A of the CPC does further somewhat towards the equality of arms principle, the clear entitlement of accused persons to the statements of witnesses must await legislative intervention. (paras 6, 23 & 25)
- (2) The public policy, or public interest element or concerns, extend to the defence stage of the case. Although the witnesses were, at that stage, technically defence witnesses, the concerns expressed by the prosecution that there still existed a danger of the witnesses being subjected to intimidation by *ie*, being coerced to depart from what was stated in the statement and the not unreal possibility of revenge being taken for what is disclosed in the statement, is not unfounded. The reluctance of potential witnesses, in future investigations, in coming forward to give their statements and to give evidence, because confidentiality is not assured, would hamper the investigative process and this, in turn, would result in hindrance and obstruction to the administration of justice. (paras 14 & 15)

Case(s) referred to:

Dato' Sri Mohd Najib Hj Abd Razak v. PP [2019] 1 LNS 434 FC (*refd*)
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 5 CLJ 23 CA (*refd*)
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 5 CLJ 93 HC (*refd*)
Husdi v. PP [1979] 1 LNS 33 HC (*refd*)
Husdi v. PP [1980] 1 LNS 29 FC (*refd*)
Siti Aisyah v. PP [2019] 7 CLJ 27 CA (*refd*)
Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC (*refd*)
The Public Prosecutor v. Pocku Syed Ismail And Anor [1973] Cri LJ 931 (*refd*)

Legislation referred to:

Criminal Procedure Code, s. 51A
 Evidence Act 1950, s. 124
 Securities Commission Malaysia Act 1993, s. 134(4)

For the applicant - Hisyam Teh Poh Teik, Ahmad Zaidi Zainal, Hamidi Mohd Noh, Aiman Abdul Rahman, Fatini Athirah Baharin, Nabihah Meor Azli, Nur Khairunnisa Sabirah Abdul Manan, Sharifah Annafiza Syed Fadzil & Mohamad Hakim Faharmi Hassan; M/s Shahrul Hamidi & Haziq
For the respondent - Raja Rozela Raja Toran, Abdul Malik Ayob, Harris Ong, Nur Aishah & Mohd Afif; DPPs

Reported by Najib Tamby

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JUDGMENT

Collin Lawrence Sequerah J:**Introduction**

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[1] This is an application made pursuant to s. 51 of the Criminal Procedure Code (“CPC”) for an order that the prosecution supply to the defence statements recorded from witnesses of the prosecution offered to the defence.

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[2] This application is made before the commencement of the defence case after this court had called for the defence of the applicant.

Analysis And Findings

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[3] In support of the application, the applicant places substantial reliance on the Court of Appeal case of *Siti Aisyah v. PP* [2019] 7 CLJ 27 (“*Siti Aisyah*”).

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[4] The respondent in objecting to the application submitted that witness statements are privileged, is a confidential communication under s. 124 of the Evidence Act 1950 (“EA”) and that it also falls under the Official Secrets Act 1972 (“OSA”).

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[5] The respondent also relied upon the case of *Husdi v. PP* [1979] 1 LNS 33; [1979] 2 MLJ 304 in the High Court and on *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80 on appeal to the Federal Court.

[6] Although several arguments were raised during the course of submission, it is my view that this application principally falls to be determined upon a consideration of s. 124 of the EA.

[7] The section reads as follows:

124. Official communications.

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No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure:

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Provided that the court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to the public interest and, if the head of the department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications.

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[8] The leading decision on the subject is the Federal Court case of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733, where the apex court dealt with statements made under s. 134 of the Securities Commission Malaysia Act 1993 and s. 124 of the Evidence Act 1950 (“EA”) pursuant to the question of law posed, namely, having regard

to the principle of law in criminal proceedings that all statements made to and recorded by an investigating officer of the Securities Commission pursuant to s. 134(4) of the Securities Commission Malaysia Act 1993 are not to be disclosed to the defence, whether the Court of Appeal was right in law in ruling that all such statements are, however, disclosable in civil proceedings.

[9] The material portion of the judgment in the case is reproduced as follows:

[48] Reverting to the present appeal, the issue we have to consider is whether the privilege under s. 124 of the Evidence Act 1950 is applicable? Applying the law which we have just set out, *in considering this pivotal issue, the court would have first to determine whether the communication in question had been made to a public officer in official confidence. If the answer is in the negative, then the s. 134 statements will have to be disclosed. If the answer is in the affirmative, then it is for the officer concern to decide whether the statements should be disclosed or not?*

...

The s. 134 statements sought by the respondent are actually statements given by 38 other persons interviewed by the appellant in the course of the Kenmark investigations. According to Mohd Rizal, those 38 persons came in and provided the information which was recorded in their statements to the appellant on the basis that the statements were confidential. *On the affidavit given, it is clear to us that the s. 134 statements of the 38 persons were communication made by each of them to the investigation officer of the appellant in the course of their official duties as public officers under the SCA, and that the communications by the 38 persons were made to them in official confidence. Mohd Rizal deposed that if the s. 134 statements were ordered to be disclosed, future witnesses will not give their information to the appellant with the assurance that their statement will be confidential. This, according to him will greatly prejudice the appellant's ability to carry out its future investigations into offences under the securities law, not just into Kenmark, but into any other company. In other words, public interest would suffer by the disclosure of the s. 134 statements. As we have decided that the communications were made in official confidence, it is for the officer to determine whether public interests would suffer by the disclosure of the s. 134 statements. He had determined that it would. We will not interfere.* (emphasis added)

[10] Reverting to the facts of the instant case, the investigating officer ("IO"), Khairudin bin Kilau had affirmed an affidavit in which much of the concerns raised in the *Suruhanjaya Sekuriti* case were mirrored.

[11] The IO had stated that the information disclosed by the witnesses amounted to privileged communication because they were made in the course of official communication and in official confidence to him as an officer of the Malaysian Anti-Corruption Commission ("MACC").

A [12] He also stated in his affidavit that any disclosure of information made by the witnesses in their statements would prejudice and compromise the public interest because the statements made by the witnesses were made in the belief and expectation that they would be confidential in nature and any disclosure would result in future witnesses being hesitant in coming forward to give statements and this would in turn hamper efforts in future investigations.

[13] In my view, the concerns expressed by the IO fall squarely within the provisions of s. 124 of the EA and within the contemplation of the Federal Court when it decided *Suruhanjaya Sekuriti*.

C [14] The public policy or public interest element or concerns also extends in my view, to the defence stage of the case because although the witnesses are at that stage technically defence witnesses, the concerns expressed by the prosecution that there still exists a danger of the witnesses being subjected to intimidation, by for example, being coerced to depart from what is stated in the statement and the not unreal possibility of revenge being taken for what is disclosed in the statement, is not unfounded.

D [15] Secondly, the reluctance of potential witnesses in future investigations in coming forward to give their statements and to give evidence because confidentiality is not assured would hamper the investigative process and this in turn would result in hindrance and obstruction to the administration of justice.

[16] This fact itself constitutes a major public policy consideration.

F [17] Lastly, the *Suruhanjaya Sekuriti* case, being a decision of the apex court binds this court. The submission by the defence that *Siti Aisyah* correctly distinguished *Suruhanjaya Sekuriti* on the basis that that was a civil case holds no water in light of the clear pronouncement in *Suruhanjaya Sekuriti* in para. 32 of the judgment that the s. 124 of the EA rationale applies to both civil and criminal cases alike without any distinction.

G [18] The portion of the Indian case of *The Public Prosecutor v. Pocku Syed Ismail And Anor* [1973] Cri LJ 931, decided by the Andhra High Court and relied upon by learned counsel for the applicant that held that the test to be applied in determining whether a particular communication is made in official confidence is whether the document produced before, or the statement made to a public officer was or was not under the process of law and that if it was under the process of law, s. 124 of the EA does not apply, was stated to be only one of the tests to be applied.

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[19] It was not, therefore, stated to be the sole or only consideration in determining the issue. To the contrary, I find that the public policy and public interest considerations expressed above and supported by the *Suruhanjaya Sekuriti* case to be the paramount consideration in determining this application.

[20] The concerns expressed regarding public interest in the context of s. 124 EA was also noted by the High Court in the case of *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 5 CLJ 93, as follows:

[118] Furthermore, there is basis to contend that the investigators of the MACC are considered as public officers under s. 6(2) of the MACC Act, thus attracting the application of s. 124 of the Evidence Act 1950 which means that communication made to officers of MACC in official confidence cannot be compelled to be disclosed if they consider that public interest would suffer by such disclosure (see also the Federal Court decision in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733).

[21] The Court of Appeal in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 5 CLJ 23, in agreeing with the views expressed by the High Court had this to say:

[49] Further, it is not in the public interest if statements taken from witnesses and documents obtained during the course of police investigations be furnished to the appellant. Section 124 of the Evidence Act 1950 provides that a public officer cannot be compelled to disclose communications made to him in official confidence if he considers that public interest would suffer by such disclosure. This will also include communications made to MACC officers in their official confidence (See s. 6(2) of the MACCA 2009). Providing the appellant with the documents sought for in the prayers which were made in official confidence to the MACC would prejudice further investigations relating to other cases involving the appellant (See *Suruhanjaya Sekuriti v. Datuk Ishak Ismail*).

[22] The Federal Court in *Dato' Sri Mohd Najib Hj Abd Razak v. PP* [2019] 1 LNS 434; [2019] MLJU 282, affirmed the findings of the High Court and the Court of Appeal and said:

[13] ... We note that the Federal Court in *Suruhanjaya Sekuriti v. Datuk Ishak bin Ismail* [2016] 1 MLJ 733 held that evidence is admissible and should be received by the court unless there is legal reason for its exclusion. Evidence of relevant facts becomes inadmissible when its reception offends against public policy (or public interest) or a particular rule of law, an example of which is evidence of matters which are privileged against disclosure.

A [23] Thus, we have it on high authority that documents of the nature applied for by the applicant in this case are subject to privilege based upon public interest and public policy considerations flowing from the dictates of s. 124 of the EA.

B [24] In the premises, the applicant's application is hereby dismissed on this ground alone.

[25] Although the provisions of s. 51A of the CPC does further somewhat towards the equality of arms principle, the clear entitlement of accused persons to the statements of witnesses must await legislative intervention.

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